

**MINUTES
of the
SIXTH MEETING
of the
WATER AND NATURAL RESOURCES COMMITTEE**

**November 26-28, 2007
Room 307, State Capitol
Santa Fe**

The sixth meeting of the Water and Natural Resources Committee was called to order at 9:06 a.m. on November 26, 2007 by Senator Phil A. Griego, chair.

Present

Sen. Phil A. Griego, Chair
Rep. Andy Nuñez, Vice Chair (11/26, 11/28)
Rep. Paul C. Bandy
Sen. Sue Wilson Beffort (11/26, 11/27)
Rep. Ray Begaye
Rep. Joseph Cervantes
Sen. Dede Feldman (11/26, 11/27)
Sen. Mary Jane M. Garcia
Sen. Clinton D. Harden, Jr. (11/26, 11/28)
Rep. Dona G. Irwin
Rep. Larry A. Larrañaga
Rep. Kathy A. McCoy
Sen. Steven P. Neville
Sen. Mary Kay Papen (11/26, 11/27)
Rep. Mimi Stewart

Absent

Rep. Elias Barela
Sen. Cynthia Nava
Rep. Don L. Tripp

Advisory Members

Sen. Rod Adair
Sen. Vernon D. Asbill
Sen. Carlos R. Cisneros
Rep. Anna M. Crook
Rep. Nora Espinoza
Rep. Candy Spence Ezzell (11/26)
Rep. Ben Lujan
Rep. James Roger Madalena
Sen. Cisco McSorley
Rep. Danice Picraux (11/26)
Sen. Nancy Rodriguez
Sen. John C. Ryan
Rep. James R.J. Strickler
Rep. Peter Wirth

Sen. Timothy Z. Jennings
Sen. Gay G. Kernan
Sen. Leonard Lee Rawson
Rep. Henry Kiki Saavedra
Rep. Eric A. Youngberg

Guest Legislators

Rep. William "Bill" R. Rehm (11/27, 11/28)

Rep. Jeff Steinborn (11/27, 11/28)

(Attendance dates are noted for those members not present for the entire meeting.)

Staff

Gordon Meeks

Jon Boller

Jeret Fleetwood

Guests

The guest list is in the original meeting file.

Monday, November 26**Deep Water Development**

Mark Fesmire, director of the Oil Conservation Division (OCD) of the Energy, Minerals and Natural Resources Department, told the committee that 83,000 acre-feet of water per year are produced by oil and gas production or coal bed methane development in New Mexico. He said that this is saline water with concentrations of dissolved solids ranging from 1,000 parts per million to 400,000 parts per million. Therefore, most produced water is of such poor quality that the only thing to do with it is to reinject it back into the ground. As technology advances, however, some of this water becomes potentially useable, and then the question arises as to who owns it or has the rights to use it, he testified. He went on to give a detailed explanation of produced water associated with oil and gas or coal bed methane and the depths to which each might be found. He further explained the history and meaning of Section 70-2-12.1 NMSA 1978, which provides that a permit from the state engineer is not required for disposition of produced water. This means, he testified, that produced water does not fall within the jurisdiction of the state engineer, even if that water is purified and used, but that it is subject to regulation by the OCD. He then went on to explain the parameters of the OCD's rulemaking concerning produced water. He also explained the conditions under which the state engineer's jurisdiction may be triggered, i.e., if produced water is in "hydrologic communication" with surface water that is under the jurisdiction of the state engineer. He went on to explain that as his agency begins to look at options for greenhouse gas sequestration, it becomes apparent that there may be market competition for deep saline aquifers due to their potential for carbon dioxide sequestration and produced water reinjection that may affect the valuation of produced water. The ownership and pore space of subsurface formations then become significant issues.

Questions and comments addressed:

- authority of the Oil Conservation Commission (OCC) and the OCD to develop rules for produced water;
- referral to produced water as a waste byproduct;
- the "ownership" of produced water by the producer;
- reuse of produced water for resale;
- communication and information-sharing among the OCD, the Office of the State Engineer (OSE) and the New Mexico Department of Environment (NMED);
- the effect of new rules on potential application to "beneficial use";
- the cost to purify produced water;
- the response of oil and gas owners to proposed new rules and discussions between the OSE and the OCC;
- how the OSE would require a permit for beneficial use, but not if water is used in a cooling system with a closed loop;
- the opposition expressed to double jurisdiction by the state engineer over produced water;
- the state engineer's statement that he was not looking for jurisdiction over produced water or deep water not put to beneficial use;
- the NMED representative's statement that he was not familiar with the OCD's proposed rules; and
- former Representative Rob Burpo's bill for a tax credit for cleaning up produced water to introduce into the Pecos River to meet Pecos River Compact compliance requirements.

Ned Godshall, chief executive officer of Altela, Inc., told the committee that there is no economically viable way to treat produced water to make it usable for drinking water. He told the committee that "deep brackish water being withdrawn for drinking water by some utilities is not the same as produced water in the oil and gas industry". The two must not be confused, he said. Altela services the oil and gas industry by treating produced water on site adequately enough to meet reinjection standards, thereby reducing the industry's costs to haul produced water offsite. He told the committee that there is no need for any change in the way produced water is currently regulated in New Mexico. He did, however, endorse a rule change for "deep water" that is not produced water, i.e., brackish water that is 2,500 feet below the surface, that is not produced as a result of oil and gas drilling and that is destined for human consumption pursuant to the beneficial use provisions in state law. He went on to summarize some of the economics of produced water.

Questions and comments from the committee dealt with:

- specific statutory provisions for produced water;
- the purpose of secondary well recovery;
- incidental depletion;
- New Mexico's under-delivery of water to Texas partially resulting from Texas withdrawing water from the Capitan Reef;

- the reason for the potential change in the deep water withdrawal jurisdiction and a proposal for the OSE's permitting authority;
- the hydrologic difference between deep water and produced water;
- the amount of produced water produced each year, 83,000 acre-feet;
- potential rules of non-appropriability of produced water discharged into the Pecos River to enhance compliance with the Pecos River Compact;
- the cost per barrel for cleaning deep water or produced water (\$1.00 to \$6.00);
- the potential for increasing the life of a productive oil or gas well by reducing the cost of disposal of produced water;
- the cost of installation of treatment units at each site;
- specifics of exempting water below a depth of 2,500 feet depth;
- the potential for contamination of water above 2,500 feet by drilling below 2,500 feet;
- the Wyoming/Montana coal bed methane case in the courts;
- the poor quality of produced water;
- the use of treated produced water for secondary recovery of oil and gas;
- the distance of oil and gas wells from municipalities as a factor in the economics of produced water for beneficial use;
- a comparison of New Mexico with other states on produced water policy;
- history of use in other states of Altela's technology;
- on-site storage tanks; and
- the number of Altela units statewide (three currently, with two more coming).

Peter White, attorney at law, provided a handout to the committee that gave a history of the state's water statutes that deal with deep water. Section 72-12-18 NMSA 1978 was enacted in 1953, he said, declaring all underground waters to be public waters subject to appropriations for beneficial use. Section 72-12-20 NMSA 1978, enacted that same year, provided that no permit is required for underground water except in basins "declared" by the OSE. Section 72-12-25 NMSA 1978, enacted in 1967, partially exempted nonpotable water below 2,500 feet from the state engineer's jurisdiction, but Section 72-12-26 NMSA 1978 requires a person drilling for that water to file a notice of intention with the OSE and to publish a notice in the county where that drilling will occur, and Section 72-12-27 NMSA 1978 allows the state engineer to require data on the amount and quality of the water withdrawn.

Acequia Concerns Regarding Adjudication Reform

Paula Garcia, executive director of the New Mexico Acequia Association, provided the committee with a handout on acequia concerns and introduced David Benavides and Mr. White, attorneys who represent acequias, to discuss adjudication reform.

Acequia concerns are as follows:

- the process is expensive, adversarial and time-consuming;
- the state engineer tends to diminish water rights claims;
- acequias do not have the legal and financial resources of the OSE;
- there is poor communication with parciantes by the OSE; and

- the OSE opposes motions for acequias to intervene on behalf of parciantes.

The speakers opposed any reform of the adjudication process that would include a claims-based system because of the burden that would be placed on parciantes and that the parciantes cannot bear the costs of surveys. The state should continue to bear the cost of creating and updating hydrographic surveys, they said. Their handout recommended that any working group on adjudication reform include defendants and water rights claimants, including acequia organizations. They called for adequate funding for acequias' defense of their water rights through the Acequia and Community Ditch Fund.

Mr. Benavides contrasted the experience of two adjudications. On a section of the Rio Chama, he noted that 136 out of 140 property owners were able to complete their adjudications in about three years. He said this was possible because of the high level of communication between involved parties, that the meetings in the field office were scheduled so that everyone involved could attend, that there was no inclusion of priority dates in the discussions and that necessary technical work was performed while other legal assessments were being made. Mr. Benavides also acknowledged that such a quick adjudication was possible in part because there were no pueblo water rights claims on the river and it involved a very small section of the river with a relatively low number of involved parties. Regarding the other adjudication, Mr. Benavides said that the Gallinas River adjudication near Las Vegas began in 1991 and still is not resolved. He explained that one of the reasons it has taken so long is because even though attorneys for stakeholders requested meeting schedules similar to that of the Rio Chama adjudication, the OSE resisted. He also noted that the OSE opposed separate priority dates from the rest of the discussion and opposed acequia attorneys being present at the field office that was set up for the adjudication. Mr. Benavides pointed out that, instead of scheduling meetings in such a way that everyone could attend, the OSE instead began unilaterally scheduling meetings without concern as to who was able to attend. He stated that when a group of acequia stakeholders went to court over the OSE's methods, a judge agreed with most of the acequias' claims. Mr. Benavides noted that the adjudication of this area has taken so long because of a pattern of delay, appeal and exclusion of a support system for defendants by the OSE.

Mr. White told the committee that existing statutes on adjudication should not be amended. He said the hydrographic surveys should continue to be the driver and conducted by the state engineer. He said that claims-based adjudications would be disastrous. He said the main problems with adjudications are management coordination or hydrographic surveys and service. Where acequias are being adjudicated, acequia associations ought to be parties to the adjudication and should be allowed amicus status to assist parciantes. He said the high default judgment rate raises the question of whether the state engineer conducted enough outreach and made an adequate effort to communicate with parciantes. He closed by saying it is important to start at the top with the big players and "work down".

Greg Ridgley, counsel to the state engineer, was invited to respond to these presentations. Mr. Ridgley said that the comments made by Mr. Benavides were unbalanced and biased. He

said that the Gallinas adjudication has some significant matters of procedure and that personality conflicts are at play there. He said the history of tension between acequias and the City of Las Vegas is a major factor in the delays. The Rio Chama is a model that works for specific geographic areas. The reason the OSE opposes acequia associations acting as amicus parties is that the water right belongs to the parciantes, not the acequias. However, recent instructions to attorneys leading adjudications are to allow acequia associations' staff to participate. Once an adjudication reaches a court, the acequia needs to make a motion to the court to allow it to intervene or to become an attorney to the parciante.

Questions and comments from the committee addressed the following:

- the rules of civil procedure as set by the courts;
- an acequia's role in determining "duty of water";
- the germaneness of adjudication reform for the next session;
- the assistance to individual water rights owners by the state;
- the role of irrigation and conservancy districts as amicus participants;
- the disparity between acequia resources and resources of irrigation and conservancy districts; and
- a time frame for the court decision on the Pecos.

Responses to Committee Questions and Adjudication Reform Issues

John D'Antonio, state engineer, and D.L. Sanders, chief counsel to the state engineer, presented a letter to the committee acknowledging the committee's concerns about water adjudications and committing to a continuation of meetings with the judicial branch to "identify how to make future adjudication suits faster, more efficient and less intimidating for water rights claimants".

The OSE also submitted 86 pages of answers and supporting documentation to the committee to questions the committee asked the state engineer at its meeting in September. These minutes do not include the verbatim submission of the state engineer's answers. The submission is available from the OSE or from Legislative Council Service staff. The following is a summary of the points of discussion and dialogue that were conducted between the committee and the OSE.

- Valencia County meters and the Middle Rio Grande Conservancy District's authority to distribute water to junior owners and to allow well water withdrawals and the relationship to a court ruling against the state engineer;
- the Pecos River Settlement as an alternative administration scheme to prior administration schemes;
- the emphasis on budgets for attorneys in the adjudication process rather than clerical and hydrographic personnel;
- the total legal staff of the OSE (25);
- the OSE's budget for water rights adjudications and the legal division and the source of funding;

- how much money would be required to complete adjudications in the next 10 years statewide;
- the need to expedite the process in order to avoid higher costs in the future;
- the use of law students as interns and recruitment of legal students to work for the state (evaluate the budget for the University of New Mexico (UNM) School of Law to ratchet up education of legal personnel);
- a suggestion for a pre-adjudication bureau and why the OSE is not asking for a bigger budget;
- obstacles to moving forward: 13 active adjudications spread the OSE resources too thin, and there is a need for base budget expansion;
- the need for a pre-adjudication program for the middle Rio Grande reach;
- the need for a project management plan;
- the status of meetings on active water resource management rules;
- de minimis rights (domestic wells) and the fact that other states do not adjudicate de minimis water uses;
- the role of the ombudsman program in water rights adjudications and its relationship to the OSE;
- Cabresto Dam storage rights and the supplemental decree from the court;
- the need to breach Cabresto Dam to make repairs and improvements;
- a request for an electronic method for asking questions and posting the answers on the OSE web site;
- the governor's water subcabinet, its legality, its process of prioritizing projects and its cooperation with the legislature;
- a suggestion for the lower Rio Grande adjudication to begin with the Elephant Butte Irrigation District's data on irrigated acreage as the lynchpin for determination of the water rights;
- statutory authority for active water management rules applied to the Pecos River to remove the use of carriage water; and
- the current balance of the New Mexico Irrigation Works Construction Fund, its purpose and for what purpose recent appropriations have been used.

Tuesday, November 27

Proposed Legislation (Approved Legislation Provided in Appendix)

1. A bill to provide an alternative method for water rights acquisition and retirement on the Pecos River, pursuant to the Pecos River Settlement, was discussed and endorsed by the committee, with Senator Griego as the sponsor. Points of discussion included:

- the disposition of revenue to the state from leasing water or land acquired under the program;
- the use of water to revegetate retired land to native plants to control weeds;
- the support of the governor;
- provisions to prevent "double dipping" of retired water rights;
- germaneness and cost savings; and

- support from irrigators on the Pecos River.

2. A bill to appropriate money to the Bureau of Geology and Mineral Resources at New Mexico Tech for statewide aquifer mapping was approved for sponsorship by Senator Cisneros.

Points of discussion included:

- the role of and support from the OSE;
- the use of aquifer maps and data in the water rights adjudication process;
- the estimated time to complete aquifer characterization (20 years);
- the use of x-ray or other advanced technologies to map aquifers more efficiently;
- the specific areas to be characterized and other uses of the appropriation;
- the technique for measuring the quantity of water in a characterized aquifer;
- the prioritization of locales for characterization;
- the cost per acre or unit costs;
- the publication and dissemination of aquifer maps;
- the need to make this appropriation part of the base budget for the bureau;
- the cost of the Sacramento Mountains study and adequacy of the appropriation;
- the cost of the Salt Basin Aquifer characterization and status;
- the governor's previous vetoes;
- New Mexico Tech's education of hydrologists; and
- overlap and duplication of other universities' capacities for similar work.

3. An appropriation for general operating expenses for the Utton Transboundary Center at the UNM law school was approved with little discussion. Senator McSorley will sponsor the bill.

4. An appropriation for continued testing and research of an automatic precision irrigation system based on soil moisture was endorsed by the committee to be sponsored by Senator Beffort. Points of discussion included:

- protocols for measuring success;
- an appropriation to go to the OSE;
- whether there is an anti-donation issue involved;
- the applicability of the Procurement Code;
- unit cost per acreage (varies by location and by crop — an 18-hole golf course with 60 sensors costs \$50,000, with repeaters and software included);
- the geographic distribution and usefulness of the technology;
- the participation by the agriculture community;
- the cost to farmers for installation of a system (economics of the system to be part of the study);
- the source of previous funding for the research (\$335,000 from the governor's water innovation "fund");
- the parameters of the research program;
- the wireless technology used;
- the potential use of the New Mexico Irrigation Works Construction Fund and other

- options for financing farmers' acquisition of the system; and
- the record of use on golf courses in New Mexico.

5. The committee endorsed a bill to add a representative of the mutual domestic water consumers association community to the Water Trust Board after discussing whether similar representation should be extended to irrigation districts, conservancy districts, acequias and soil and water conservation districts. Representatives Larrañaga and Begaye opposed the endorsement. Representative McCoy was appointed to sponsor the bill.

6. The committee endorsed, with Senator McSorley in opposition, a memorial asking the state engineer and the Administrative Office of the Courts to continue their discussions and exploration of options to improve and expedite the water rights adjudication process. Senator Papen was appointed to sponsor the memorial. Discussion points included:

- a letter from the state engineer committing his office to the dialogue;
- contents of a memorandum of understanding (MOU) outlining the parameters of the discussions and providing for quarterly progress reports to the committee;
- provisions for public input;
- the degree of potential changes to the adjudication process;
- the need for two years to consider these options;
- the advantages and disadvantages of opening the dialogue at this point, before any proposals are actually defined;
- identification of goals in the MOU;
- the applicability statewide and prospectively, not retrospectively to existing ongoing adjudications; and
- the MOU should reflect some of the committee's concerns.

7. The committee also approved endorsement of an appropriations bill to help defray expenses of the decision-makers conference organized by the Bureau of Geology and Mineral Resources at New Mexico Tech. Representative Stewart and Senator Feldman will co-sponsor the measure.

Indian Water Rights, Negotiations and Settlements

Estevan Lopez, director of the Interstate Stream Commission, and Mr. D'Antonio summarized the status of the three Indian water rights settlements agreed to by the state: the Navajo settlement, the *Aamodt* case and the Taos settlement. Their handout states that federal government agency representatives have not yet signed any of the three settlements and will not sign until Congress directs them to do so. Legislation is pending in Congress to achieve that. Mr. Lopez disputed many of attorney Victor Marshall's objections, which Mr. Marshall expressed at the committee's meeting in Taos in August 2007.

The presenters reported that the Navajo settlement, signed in 2005, provides for water development projects for both the Navajo Nation and non-Indian communities in exchange for release of Navajo claims to water that could have displaced non-Indian water claimants' rights.

One of the key components of the settlement is the Navajo-Gallup Water Supply Project to bring water from Navajo Reservoir to Navajo and non-Indian communities in northwest New Mexico. The settlement also includes a proposed settlement contract that will provide for deliveries to the Northwestern New Mexico Rural Water Supply Project as well as the Navajo Indian Irrigation Project. As far as the adequacy of water to fulfill the provisions of the settlement, the Upper Colorado River Commission supports the Department of Interior's hydrologic determination that sufficient water is available to satisfy the terms of the settlement. A draft environmental impact statement (EIS) has been completed and a final EIS is expected this spring.

The presenters told the committee that the total estimated cost of the settlement is now \$900 million. The most expensive component is the Navajo-Gallup pipeline, at a cost of \$864 million. The congressional delegation has requested the state to commit \$50 million of that cost.

The *Aamodt* settlement involves the City of Santa Fe and Santa Fe County and the pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque. They told the committee that the settlement will protect the non-pueblo junior water rights from future pueblo priority calls. The agreement provides for forbearance by the pueblos on priority calls, except under certain conditions, and provides for the federal government to acquire 2,500 acre-feet of additional water for the pueblos to make up for that forbearance. A pipeline will be constructed from the Rio Grande to serve pueblo and non-pueblo residents of the area, and well owners may hook up to that pipeline and stop using ground water.

The total estimated cost of the *Aamodt* settlement is \$309 million, of which the state would provide \$50 million.

The presenters told the committee that the Pueblo of Taos, the state and several Taos area non-pueblo water rights owners, including the Town of Taos, the Taos Valley Acequia Association, El Prado Water and Sanitation District and 12 mutual domestic water consumers associations, signed an agreement in May 2006. They said it preserves existing acequia water uses, water-sharing agreements between the pueblo and acequias and allocation of San Juan-Chama Project water available for the settlement. The estimated total cost of the settlement is \$134 million, \$14 million of which would be the up-front cost to the state in addition to 25% of whatever escalation in costs are experienced. They requested an appropriation in fiscal year 2008 of \$13,070,000 to meet the settlement provisions of that much for each year over the next nine years.

Mr. Marshall characterized the Indian water rights settlements and their negotiations as follows: they are conditional, unrealistic and exclusionary of key water rights owners; there is over-allocation of water to Native Americans; negotiations were closed to the general public's participation; there were overreactions to the "Winters Doctrine"; they are the political vehicles of the governor; and the settlements may prolong litigation. He criticized the Navajo settlement in particular, emphasizing that it gives away one-third of the state's surface water to the Navajo Nation, and it ignores all the non-Indian water claimants on the San Juan River. He said the

settlement gives away more water than exists and that the Navajo Nation should have to document their claim under the Winters Doctrine.

Points of discussion by the committee included:

- the high costs of the settlements;
- pending action by Congress;
- the role of the state courts and relationship of negotiated settlements between the state and the tribes alone and the determination of water rights by adjudicating courts;
- the effect of the settlements on the San Juan-Chama diversion;
- disposition of the settlements if the conditions of appropriations and/or adjudications are not met;
- status of the water rights adjudication on the San Juan River;
- the relationship of the Navajo irrigation project and agricultural program to the settlement;
- the potential export of water by the Navajo Nation (the settlement prohibits this, but enforceability of the settlement was questioned);
- why the whole San Juan Basin is not adjudicated simultaneously;
- Arizona's position on New Mexico's settlement with the Navajo Nation and whether Arizona has negotiated a settlement as well;
- Gallup's role and the MOU between Gallup and the Navajo Nation;
- the legislature's jurisdiction to approve these settlements;
- the Taos settlement terms;
- the ability under the settlement for the Navajo Nation to export the settlement water to its members living in other states;
- an invitation to Navajo representatives to testify to the committee next year;
- the issue of some Navajo acquiring water from non-Navajo communities and acequias or ditches and potential opposition to the settlement by some Navajo members;
- the history of appropriations for Indian water rights settlements and the governor's veto two years ago;
- the incoherence of water law;
- the legislature's responsibility and constitutional role to set policy, not the executive through closed negotiations; and
- the need for negotiated settlements.

Water Markets

Lee Brown, economist, testified that New Mexico water markets have been relying on nonrenewable water, i.e., ground water mining. He said that markets for water are merging now after years of significant urban growth. In this environment, it is important for price information to be available. Water is measured in acre-feet or acres of water rights. Prices for water vary widely between the basins from \$2,381 per acre-foot to \$45,000 per acre-foot. He said that mining of water in the high plains, the Gallup area, the Estancia Basin and the middle Rio Grande is not sustainable and will eventually price the remaining ground water out of reach. Political intervention is needed. He recommended that the legislature consider stronger regulation, water banking and local severance taxes on mined water. He said that the state may

need to become an active facilitator of water sales or leases. The proprietary treatment of water prices is an obstacle to the public interest of water markets. Prices need to be reported on change of ownership forms issued by the state engineer, but the state engineer argues that he does not have the statutory authority.

Points of discussion included:

- dramatic increases in the water rights process; and
- the mining of aquifers and theoretical value of "dry water rights".

Mutual Domestic Water Consumers Associations' Critical Needs

Senator Cisneros addressed the committee on behalf of Rodarte, a community in his district. He told the committee that 14 homes in Rodarte have contaminated wells and need immediate assistance. The governor provided \$300,000 in emergency funds, and the Rodarte Mutual Domestic Water Consumers Association may extend its lines to connect the homeowners, but if this happens, the association will need additional help to enlarge its service capacity.

Rick Martinez, deputy secretary for finance and administration, explained that this is a statewide issue. House Joint Memorial 86 from the 2005 session asked that the state engineer collaborate with the NMED in water system planning and move toward regionalization as a condition for financing.

Charlie Sanchez, a Rodarte resident, explained that the water is significantly contaminated. George Maestas, a member of the Rodarte Mutual Domestic Water Consumers Association, told the committee that the association had 33 members in 1987 when it was last upgraded and it now has 58 member-connections. He said it needs a bigger storage tank and needs to relocate its well because there are seven septic systems within a radius of 200 feet.

Points of discussion included:

- a description of the 1987 upgrades;
- the source of the contamination;
- water heater problems;
- the shallowness of the wells;
- the location of the proposed new well and the need to serve Llano and Rodarte;
- the anti-donation issue of using public money to benefit private residences for replacement of private appliances (i.e., water heaters);
- coordination by the water subcommittee to assist communities like this;
- mutual domestic service rates and hookup costs;
- the Department of Transportation's refusal to break pavement to install new pipes;
- low-income communities;
- an evaluation of regional jurisdictions based on criteria of optimal rate base; and
- examples of regionalization.

Wednesday, November 28

Game and Forest Management Impacts

Charles Walker, a rancher from Otero County, addressed the committee about the impact on his family of grazing allotment reductions by the U.S. Forest Service (USFS) due to the elk population on his ranch. He explained that he is a third-generation rancher in that area with four more generations to follow him if they can stay in the ranching business under the current conditions. His grandfather started in 1887, and he described the history of the pioneers in the area. He said when the federal government established the USFS, ranchers were promised they would be able to continue to hold their grazing rights, just as they were promised their water rights as prior appropriated rights as long as they put them to beneficial use. Ranchers were grazing in the public domain before the creation of the USFS, but there was abuse of the range at the time, and the USFS established limits through grazing allotments and permits. Part of those controls was the establishment of grazing advisory boards, one of which Mr. Walker was a member for 25 years. He said that in the early days, science was not used as the basis for management but experts were eventually brought in to establish better management, standards. He said Rocky Mountain elk were introduced in the early twentieth century onto the range, where they were not native. Commitments were made at the time that elk would not be allowed to harm ranching allotments. Since then, however, the elk population has multiplied and damage to the range has occurred. The elk population has not been managed as promised. Instead, he said, the USFS has reduced the animal unit months allowed ranchers. He asked for compensation for the elk depredation and reduction of his livelihood and damage to the range resources. He suggested that landowner hunting permits from the Department of Game and Fish would suffice to redress the harm to ranchers.

Mrs. Jimmy Goss, also a rancher from Otero County, told the committee that her family has ranched the land since the 1880s. She said allotments on federal land are private property rights. They are like a split estate and have a market value. She said she did a title search and found that the Lincoln National Forest supervisor is a title holder of grazing allotments. She said title allotments are like land grants in that the USFS issued the original allotments when it was created to the existing ranchers on the land. She said that her family's ranch is a combination of 12 title allotments that go back to 1910. She told the committee that the position of the USFS is that the allotments are not property of the ranchers, but she can demonstrate that the history of the legal title to these allotments extends back before the creation of the USFS.

She testified that, using science, the Range Improvement Task Force found that 18% of the use of the range resources can be attributed to cattle and, 82% to elk. She produced records that show the cost to her ranch of Department of Game and Fish and USFS policies. Her grazing right should be 553 cattle, but she was ordered to remove 120 cattle by a court in a lawsuit filed by Forest Guardians. She said there are 4,000 elk presently on her family's allotment. She asked for compensation and for legislation to require the USFS to manage the land fairly.

Mike Nivison, Otero County commissioner, testified that Otero County has enacted an

ordinance concerning elk management. For perspective, he told the committee that on 139,000 acres, there is an average number of 330 cattle and an average of 4,000 elk. They rely on the same range grasses. The numbers tell the story, he said. He said allotment holders pay taxes on the original valuation of the allotment, but they are subsidizing the wildlife and are being damaged by the state and federal range management decisions. He said the federal land is in the public trust and should be used for what it was set aside for. He said these policies are a danger to the continuation of agriculture in New Mexico. He said imported food is more dangerous to public health than local food and with policies such as these, agricultural producers will be unfairly displaced from their land and people will be increasingly reliant on imported food.

He told the committee that it is a matter of sustaining the environment as well and that science should be used in determining how much elk to allow. Water is becoming scarce, he said. Cloudcroft ran out of water this year, and the elk had a role in that by the damage they do to the ecosystem from overgrazing and harming the land's ability to act like a sponge and absorb rain and snow precipitation. Without the grass cover and trees, the water just runs off. The elk population is so large that the vegetation is being removed faster than it can grow and provide cover and retain water. He closed by saying that good forest health would support a full cattle grazing allotment and a lot of elk, but best available management practices are not in place.

Senator Griego made some comments about the presentations. He said that this is an issue all over the state. It is very difficult to deal with the USFS or the National Park Service. They are not always user friendly, he said. They are not friendly to the constituency. He said while the USFS cuts the amount of cattle grazing on historic ranch allotments, it wants to open the same lands to off-highway vehicle usage, which does more damage than any grazing does. Hopefully, the USFS can be moved off dead center, he said. He said the land is good and beautiful because of the ranchers and farmers. He said the state legislature does not have a lot of power over federal land management agencies, but perhaps it can influence the New Mexico congressional delegation. Congressman Steve Pearce of the Second Congressional District was in the audience, and Senator Griego introduced him and gave him a letter concerning USFS policies.

Mr. Walker pointed out that there is no more rotation grazing on the forest resources because elk move in and undo the beneficial effect of reduced cattle. He then gave the microphone to Congressman Pearce.

Congressman Pearce thanked Senator Griego for the gracious introduction and for his assistance. Congressman Pearce told the committee that he is a member of the congressional committee whose mission corresponds with that of the Water and Natural Resources Committee, and he has not gotten briefings as good as the ones he received as a member of this committee when he was a member of the state House of Representatives for four years. He discussed the situation in Catron County involving a rancher who was arrested for running his cattle on USFS property without a valid permit. He said the federal government confiscated more than \$400,000 off that allotment. The USFS paid truckers to remove the cattle but did not pay the rancher for

his cattle. He said this constitutes a culture of arrogance in the USFS. He said the USFS should clean up the forest and that it plays off the Department of Game and Fish. Elected officials have to address the fact that these agencies make decisions without being accountable for the consequences, he said, but there are reasonable solutions on every issue if negotiations are held in good faith, he added. Congressman Pearce invited questions from the committee and the following topics were discussed in a general give and take between the congressman and committee members:

- the Mescalero Apache Tribe's better management of its natural resources than that of the federal agencies;
- the basis for the USFS's allocation for watershed management;
- watershed restoration;
- Otero County's wildlife ordinance;
- the healthy forest initiative;
- the need for collaboration;
- farmers' markets;
- progress in elk management;
- division of ownership (split estate) between ranchers (grass, water and cattle), the Department of Game and Fish (elk) and USFS (trees);
- lawsuits as obstacles to progress;
- the decline of mills in New Mexico and 20,000 lost jobs to Canada;
- how USFS claims to infrastructure and bureaucracy are bound by many conflicting functions;
- lawsuits blocking logging; and
- the need to unravel the bureaucracy's ball of thread.

Points of discussion and questions to Mr. Walker and Mrs. Goss included:

- the date of the Mescalero Apache Tribe's introduction of elk into forests;
- the number of elk tags needed to compensate ranchers adequately;
- landowner permits;
- animal unit months (AUM) allowed on USFS allotment units (100);
- legal options for ranchers;
- how much is spent each year to improve allotments;
- the unresponsiveness of state and federal bureaucracies;
- the economic impact of reducing elk and/or elk hunting;
- the amount of land in an allotment;
- how state law does not allow private permits of public lands; and
- the number of ranches being affected.

The committee approved the minutes of the October meeting.

Bruce Thompson, director of Department of the Game and Fish, asked the committee to consider the issue in context. He said there are 65,000 residents in Otero County. It is not as simple as elk and cattle, and it is not just about a couple of people that have elk or cattle on their

ranch; it is an issue of the ecosystem needs, he said. The department has spent \$2 million attempting to address habitat improvement. He testified that 8,000 elk have been killed in that unit and the department is making progress, but it cannot satisfy every individual. Others are supportive of what the department is doing, he said.

Butch Blazer, state forester, testified that the problem on the national forests is too many trees. The density of trees on national forest land is much higher than it ever was in a natural state before mankind intervened and suppressed naturally occurring wildfires. There have been some leadership changes in the USFS that will lead to progress to improve the conditions. He said there is now a willingness and an understanding to work with the counties and local communities. There is a need to develop a "large stewardship contract" to get infrastructure in place. One of these contracts has been developed in Arizona and may serve as a model for New Mexico. Stewardship protocols are based on science, and New Mexico's Range Improvement Task Force represents that good science in the state.

John Fowler, director of the Range Improvement Task Force based at New Mexico State University, told the committee that there were 9,000 head of cattle in New Mexico in 1988. In 2005, there were less than 4,000. During the same time, trees have increased and meadows have declined. The contribution of logging to New Mexico's economy in 1987 was more than \$6 million and now it is zero. Catastrophic fires are possible, he said. Resources need to be brought in to manage the forests, but one notice of intent to sue stops resource management dead in its tracks. Good science and data are needed to respond to notices of intent. Prolonged, thoughtful study can improve decision-making and can support the benefit of salvage cuts that enhance wildlife, water production and fire prevention, he testified. Harmful clearcutting that has generated environmental opposition is not the issue. Selective thinning that is monitored and whose effects are documented is the issue.

Gilbert Zepeda, deputy regional USFS supervisor, former regional director of the State and Private Cooperative Forestry Program and former district ranger for the Santa Fe National Forest, told the committee that there are 985 permits and 600 grazing allotments in New Mexico. This translates into 928,000 AUMs on the national forests and 164,000 AUMs on the national grasslands. Solutions to these problems rely on all parties working together, he said.

Points of discussion on these comments included:

- economic development associated with more elk permits and reducing the elk herd population;
- whether it is more economical to compare hunting and agriculture than the departmental budgets;
- the issuance of individual permits on USFS land to allottees;
- the fair estimate of elk population on the Lincoln National Forest (1,500-3,000);
- the \$37 million budget of the Department of Game and Fish being dependent on hunting and fishing licenses (elk being the largest single component);
- detailed discussion, disputed numbers and confusion over the data of elk populations, acreage of habitat, tribal acreage versus national forest, costs and revenues;

- wolf introduction in southwest New Mexico and why public meetings are held in Phoenix, Tucson and Albuquerque rather than in the areas where the wolves are being introduced;
- federal budgets for thinning the forests (or lack thereof);
- the mindset and distance between facts and emotions and the need for all parties to move toward solutions;
- disputes over science between the Range Improvement Task Force and the Department of Game and Fish;
- the penalization of ranchers because of elk population and the potential for compromise;
- a statutory change to allow issuance of hunting permits and authorizations to public land allottees, not just private landowners;
- a requirement to get infrastructure for timber harvesting and material processing back in place;
- the source of investments for allotment improvements;
- a comparison of USFS management and Mescalero Tribal Apache management;
- how the population of elk on Unit 34 varies (2,300-5,000) depending on the year, season and climate;
- the amount of money paid out to private property owners for damage by the Department of Game and Fish (none);
- assistance to private landowners for damage (fencing, etc.);
- the role in court suits of data and science;
- the need for a paradigm shift;
- sportsmen opposition; and
- how fast can forests be brought back to equilibrium.

The chair summarized the need for state and federal agencies to work with one another to find a resolution to this problem to benefit the constituents.

The committee adjourned at 1:00 p.m.